No. 96-1133

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED STATES OF AMERICA,
Petitioner,

v.

EDWARD G. SCHEFFER,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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This *amicus curiae* brief is submitted in support of the position of the Respondent Edward G. Scheffer. Written consents of the parties to the filing of this brief have been contemporaneously submitted to the Clerk of the Court.[1]

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[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party other than counsel authored this brief in whole or in part; no person or entity, other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 9,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to ensure due process in the administration of the criminal justice process, which fundamentally requires that the accused be afforded a fair opportunity to defend against the government's accusations. That opportunity cannot be guaranteed without recognition of the right to have relevant, probative evidence considered by the factfinder and tested in the crucible of the adversary process, absent some overriding policy justification for refusing to hear the evidence.

NACDL submits this brief because the government's effort to reverse the Court of Appeals and reinstate the blanket exclusionary rule barring an entire field of scientific evidence, without regard to any showing of reliability or relevance in a particular case, would impede the discovery of truth in the courts and increase the risk of convicting the innocent.

SUMMARY OF ARGUMENT

This case involves a categorical exclusionary rule which withholds from the factfinder any probative and exculpatory polygraph evidence offered on behalf of the accused under any circumstances.

Unjustifiable exclusionary practices have been a chronic occurrence with regard to scientific polygraph evidence. The adjudicatory process in American courts has been unnecessarily sheltered from developments in an important body of scientific knowledge about the psychophysiological processes of the human body, while most other segments of society, including notably law enforcement and the federal government in general, have been actively putting that scientific knowledge to work for their own factfinding purposes.

Rather than trust the courts to deal with the admissibility of this area of scientific expertise in accordance with this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the executive branch of government has relied on empirically unfounded apprehensions and misconceptions about the polygraph to impose a *per se* ban on any consideration of the evidence. The purported justifications for this extraordinary categorical exclusion of an entire field of science are not supported by either research or empirical experience.

The result is the denial of the accused's sixth amendment right to present relevant and reliable exculpatory evidence to the trier of fact.

ARGUMENT

I. THE BLANKET EXCLUSION OF ALL RELEVANT AND RELIABLE POLYGRAPH EVIDENCE DENIES THE ACCUSED'S SIXTH AMENDMENT RIGHT TO CALL WITNESSES IN HIS DEFENSE.

A. Historical Context of Rule 707.

1. The Traditional Apprehension and Fear of Polygraph Evidence.

There is no single category of evidence in the history of American law that has been subjected to stricter scrutiny by the courts, to greater government resistance against admission and to such a widespread reluctance to accept scientific realities in the courtroom than has been the case with polygraph evidence. *See, e.g.*, James R. McCall, *Misconceptions and Reevaluation - Polygraph Admissibility After Rock and Daubert*, 1996 U. ILL. L. REV. 363.

In a sense, uninformed skepticism should no longer be surprising. The polygraph measures phenomena occurring inside the body that we cannot perceive without the assistance of this scientific instrument, much as we cannot perceive that the earth is not flat by looking out the window. We can observe external manifestations of consciousness of deception, which we have recognized historically as demeanor evidence or as circumstantial evidence of consciousness of wrongdoing, but we cannot see the very real internal activities that ultimately cause these phenomena to occur.

To many who have not seriously studied the scientific underpinnings and the thorough validity testing of the

polygraph, it can appear to be something akin to a magic box or to have aspects of the paranormal. Those who have never actually observed the presentation of polygraph evidence before a jury fear that it will have "an aura of near infallibility, akin to the ancient oracle of Delphi." *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975).[2]

This initial resistance of the uninformed cuts across all walks of life, even including such groups as scientists, juries, lawyers and judges. Even those who have become the technique's strongest scientific supporters have done so only after thorough research, testing and experience have caused them to reassess their prejudgments. *See, e.g., United States v. Galbreth*, 908 F. Supp. 877, 883 (D.N.M. 1995). It is therefore not surprising that well-intentioned people who have not thoroughly studied nor had practical experience with polygraphs are honestly apprehensive about the validity of the science or its feared effect on the adjudicatory process. At some point, however, supposition has to give way to science, and good faith yet erroneous assumptions must be replaced by realities.

The blanket exclusionary opinions cited by the government and the *amicus* attorneys general in their briefs illustrate the unique reception that polygraph evidence has received historically in our adjudicative processes. There were only occasional exceptions to that trend before 1993, such as the Eleventh Circuit's opinion in *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1988), and the New Mexico Supreme Court's admissibility decision in *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975), which led that court to promulgate an evidentiary rule in 1983 to set

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[2] That often quoted apprehension has never been substantiated by a single scientific experiment or empirical study over the two decades of its repetition. In fact, the evidence is all to the contrary. *See* Point IB3, *infra*.

standards of admissibility for polygraph evidence in the New Mexico courts. N.M. R. EVID. 11-707 (Michie 1997). *See* Point IB3, *infra*.

Even those judicial opinions which have acknowledged the reality of the developments in the hard[3] science of psychophysiology, the parent science upon which the modern polygraph examination is based, still express trepidation about accepting the evidentiary consequences of those scientific developments. *See, e.g., United States v. Piccinonna*, 885 F.2d 1529, 1537 (11th Cir. 1989) ("We proceed with caution in this area . . ."); *United States v. Posado*, 57 F.3d 428, 436 (5th Cir. 1995) (concerned about opening a "legal Pandora's box"). Other opinions candidly acknowledge outright hostility. *United States v. Cordoba*, 104 F.3d 225, 232 (9th Cir. 1997) ("We have long expressed our hostility to the admission of unstipulated polygraph evidence . . . . With this holding, we are not expressing new enthusiasm for admission of unstipulated polygraph evidence.").

The pervasive hostility found a supporting rationale for many decades in both the "general acceptance" requirement of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and in unscientific hunches and doubts about the reliability of polygraph evidence that continued to ignore the scientific realities that were becoming well known outside the courthouse walls.

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[3] McCall, *supra*, at 368 n.24. Psychophysiology, a recognized scientific specialty within the field of psychology, deals with the measurable interaction between human physiology and psychology. The scientific polygraph instrument has long been used in various contexts to measure and record simultaneously various physical reactions to measure changes in the human body that relate to psychological states.

2. Recognition of Scientific Realities.

Two judicial opinions can be credited for breaking this trend. The first was the Eleventh Circuit's *en banc* decision in *United States v. Piccinonna*, *supra*, which thoroughly studied the controversy and determined that "since the *Frye* decision, tremendous advances have been made in polygraph instrumentation and technique"; that "the FBI, the secret service, military intelligence and law enforcement agencies use the polygraph," 885 F.2d at 1532; that "in recent years polygraph testing has gained increasingly widespread acceptance as a useful and reliable scientific tool"; that there is "a lack of evidence that juries are unduly swayed"; and that "a per se rule disallowing polygraph evidence is no longer warranted." 885 F.2d at 1535. That court therefore articulated standards for admissibility of polygraph evidence which were designed to "achieve the necessary balance." *Id.* Polygraph evidence has been admissible in the Eleventh Circuit under those standards since 1989 without reported difficulties. *United States v. Padilla*, 908 F. Supp. 923 (S.D. Fla. 1995); *Elortegui v. United States*, 743 F. Supp. 828 (S.D. Fla. 1990).

The most important opinion, however, came several years after *Piccinonna*, when this Court expressly overruled *Frye* in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Before *Daubert* was decided, most courts had steadfastly refused to acknowledge the mounting evidence of the scientific basis and the modern realities of the polygraph. After *Daubert*, mere citations to *Frye* or conclusory *ipse dixit* statements that the polygraph was unreliable, or was unscientific, or was not generally acceptable, could no longer justify a refusal to look at the underlying science and the developments in testing and administration of the modern control question polygraph.

A number of circuit courts have acknowledged that they must now undertake the objective analysis that this Court mandated in *Daubert* before refusing to permit a jury to consider scientific polygraph evidence. *See, e.g., United States v. Cordoba*, 104 F.3d 225 (9th Cir. 1997); *United States v. Pulido*, 69 F.3d 192 (7th Cir. 1995); *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995). The courts which have been willing to put aside earlier prejudgments and take a serious analytical look at the scientific evidence in a *Daubert* hearing have agreed that the modern control question polygraph is reliable scientific evidence under Rule 702 of the Federal Rules of Evidence. *See, e.g., United States v. Galbreth*, 908 F. Supp. 877 (D.N.M. 1995); *United States v. Crumby*, 895 F. Supp. 1354 (D. Ariz. 1995); *Ulmer v. State Farm Fire & Casualty Co.*, 897 F. Supp. 299 (W.D. La. 1995).

3. The Shift Away from Scientific Reliability Analysis to Evidentiary Blackballs.

Unfortunately, *Daubert* has not served to change the ultimate reality of *per se* exclusionary practices. The major change in many post-*Daubert* cases has not been a change toward acceptance of the consequences of the opinion, but rather has been a shift in the stated rationales for what are, in effect, continued *per se* refusals to admit the polygraph evidence.

More recent stated grounds have tended to avoid the scientific realities and have instead recited Rule 403 discretion and other recurring exclusionary theories. *See, e.g., United States v. Pettigrew*, 77 F.3d 1500, 1515 (5th Cir. 1996) (refusing admission because the defense did not notify the prosecution of its intention to introduce favorable polygraph results before the defense expert had even administered the examination); *United States v. Sherlin*, 67

F.3d 1208, 1217 (6th Cir. 1995) (could not introduce defendant's unstipulated polygraph because his credibility was "maybe the central issue in this case"); *United States v. Pulido*, 69 F.3d 192, 205 (7th Cir. 1995) (excluding defendant's polygraph where the results were allegedly peripheral to the "core issues"); *Palmer v. City of Monticello*, 31 F.3d 1499, 1506 (10th Cir. 1994) (simply reciting that there was no abuse of discretion in excluding the evidence, without discussion of the particular prejudice or probative value necessarily involved in the exercise of Rule 403 discretion).

This case exemplifies another tactic of excluding what can prove to be relevant and reliable scientific evidence otherwise admissible under *Daubert*: the exercise of executive or legislative fiat to circumvent court opinions and the adjudicative process by imposing a blanket exclusionary ban on judicial consideration of any polygraph evidence, no matter how relevant or reliable it can be shown to be in a particular application. For example, in *Witherspoon v. Superior Court*, 133 Cal. App. 3d 24, 183 Cal. Rptr. 615, 621 (Ct. App. 1982), the court reviewed the status of the modern polygraph and concluded that there is "nothing so unique about the polygraph examination that justifies the court's continuing to treat it as an evidentiary pariah." Noting that the widespread rejection of the polygraph appeared to be based less on any demonstrable lack of reliability of the test than on an unrealistic fear that lay juries would tend to be overly impressed, the court held that polygraphs could be admitted subject to traditional evidentiary regulation, such as determinations of probative value and prejudicial impact in particular cases. *Id.* at 618-621.

The California legislature responded to *Witherspoon* by imposing a categorical ban to prohibit introduction of polygraph evidence in criminal cases only. CAL. EVID.

CODE § 351 (Deering 1996). Interestingly, for well over a decade, polygraph results have continued to be admissible in civil cases in California, *see Kathleen W. v. Shirley W.*, 190 Cal. App. 3d 68, 235 Cal. Rptr. 205 (Ct. App. 1987), with no reported adverse effect on the civil justice system in that state. *See* James R. McCall, *Misconceptions and Reevaluation - Polygraph Admissibility after Rock and Daubert*, 1996 U. ILL. L. REV. 363, 390. The statute also allows factfinders to rely on the results of polygraph examinations in making their factual determinations in criminal cases if the opposing party stipulates[4] to the administration and admission of the polygraph. *Id.*

The rule now before the Court had a similar genesis. In *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987), the court anticipated *Daubert* in determining that polygraph results can be scientifically reliable evidence which must be admitted under the military counterparts to the federal rules on expert testimony. Not only did *Gipson* conclude from its review of the scientific polygraph evidence that "the greater weight of authority indicates that it can be a helpful scientific tool," *id.* at 249, the court relied on the widespread reliance on polygraph results throughout the country, particularly in

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[4] The frequently-encountered stipulation approach, "prevalent in most circuits," *United States v. Crumby*, 895 F. Supp. 1354, 1356 (D. Ariz. 1995), cannot be justified on any sound jurisprudential basis. *See, e.g., United States v. Oliver*, 525 F.2d 731 (8th Cir. 1975) (Polygraph evidence reliable enough to be admitted over defendant's objection where he had agreed to stipulate admissibility before taking test). If the evidence is relevant and reliable, opposing counsel should not have the unilateral power to decide whether the jury should hear it. And if it were not relevant and reliable, why should a jury be permitted to use it as a basis for important factual determinations? Surely, courts of law would not countenance using the results of trial by ordeal or combat or the testimony of a ouija board interpreter, no matter how much advance stipulation by the parties had taken place.

military and other federal government factfinding processes, and on the published research showing that juries are quite capable of evaluating the evidence.

4. The Promulgation of Rule 707.

The government did not seek certiorari in this Court to review the *Gipson* record. Instead of resolving the issue through judicial channels, the federal government responded with Exec. Order No. 12,767, 56 Fed. Reg. 30,284 (1991), which promulgated MILITARY R. EVID. 707 to block the effect of the *Gipson* holding. The written explanation supporting the rule contained conclusory recitations that polygraph would adversely affect the jury and consume undue amounts of time, all without citing a single scientific laboratory or empirical study to support those declarations. Instead, it relied on pre-*Daubert* court opinions which had rejected polygraph evidence historically, generally without analysis of the numerous published scientific studies.

The effect of the rule is to preclude the possibility of any *Daubert* foundation or other showing of reliability, relevance, necessity or any other evidentiary consideration in any particular case. It also absolutely bars the courts from considering any further developments in the science over the coming years. It essentially freezes the evidentiary processes of the courts into a complete prohibition of an entire category of scientific evidence. There is no valid justification for such an extraordinary absolute bar. It is just as violative of the Sixth Amendment as similar blanket prohibitions struck down by this Court in *Washington v. Texas*, 388 U.S. 14 (1967), *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Rock v. Arkansas*, 483 U.S. 44 (1987).

B. Rule 707's Categorical Ban is Unjustified by Science, Experience or Jurisprudence.

The primary purported justifications for Rule 707 relate to fears about polygraph reliability, about taking up the time of the courts and about the polygraph's supposed intrusion on the function of the jury. None of those fears is justified.

1. The Specific-Issue Control Question Polygraph Satisfies the *Daubert* Scientific Evidence Analysis.

The trial court below refused to afford the accused an opportunity to present his evidence and refused to conduct a *Daubert* hearing on the scientific reliability of polygraph evidence. Instead, the court relied solely on the *per se* rule and its conclusory justifications to exclude the evidence without considering its scientific reliability or its relevance in this particular case.

Although the government makes some partial concessions to the scientific reliability of the polygraph in its brief, *see, e.g.*, Br. of U.S. n.7, it relies on critics of polygraph, notably the minority view of the Lykken-Iacono "Minnesota" school of oppositionists, to argue that the polygraph is not scientifically reliable. However, not only is the existence of disagreement in the scientific community not a ground for exclusion under *Daubert*, a serious study of the hundreds of articles and published laboratory and field studies leads to the conclusion that the specific-issue control question test provides scientific evidence which meets the *Daubert* standards set by this Court. *See, e.g., United States v. Galbreth*, 908 F. Supp. 877 (D.N.M. 1995). *Amicus* will not repeat here the scientific analysis in the *amicus* brief filed by the Committee of Concerned Social Scientists, in the

voluminous published studies and in the opinions of the growing number of courts which have addressed the scientific issue. However, there is another consideration on the reliability issue that should be addressed.

The Justice Department's policy is to oppose the use of polygraph evidence in court (Br. of U.S. n.5), but it is a truism of human experience that actions speak more loudly than words. The very government that is contesting so vigorously the consideration of polygraph evidence on the part of the accused has repeatedly admitted the validity and reliability of the control question polygraph for years by both word and deed.

By 1982, the Office of Technology Assessment reported that federal agencies conducted over 22,000 polygraph examinations annually, and the numbers were increasing. OFFICE OF TECHNOLOGY ASSESSMENT, 98TH CONG., SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW AND EVALUATION - A TECHNICAL MEMORANDUM, app. at 107 (1983) ("OTA Report"). As acknowledged by the Director of Research for the Department of Defense Polygraph Institute, which trains the majority of the hundreds of federal polygraph examiners, the polygraph is routinely used as a factfinding technique in criminal investigations throughout the United States. Gordon H. Barland, *The Polygraph Test in the USA and Elsewhere*, *in* THE POLYGRAPH TEST 73, 75 (Anthony Gale ed., 1988). By 1988, there were already over 300 active federal examiners in all branches of the armed forces, the FBI, CIA, NSA, U.S. Postal Service, Secret Service, DEA, BATF, U.S. Marshal Service, U.S. Customs and Defense Investigative Service. *Id.* at 76. Just this last year, the Department of Defense alone conducted over 12,000 polygraph exams. DOD POLYGRAPH INSTITUTE, 105TH CONG., FISCAL YEAR 1996 REPORT TO CONGRESS ON THE DOD POLYGRAPH PROGRAM 1 (1997) ("DOD Report").

These examinations are not conducted for experimental purposes; they are conducted because the government knows they are a useful aid in their factfinding processes:

> This report contains numerous examples of polygraph utility in resolving counter-intelligence and security issues as well as criminal investigations. The polygraph is clearly one of our most effective investigative tools.

DOD Report, *supra*, Executive Summary.

As Special Agent James K. Murphy, the Chief of the 80-agent polygraph unit of the FBI has publicly acknowledged, "the polygraph technique, when properly used by competent, well-trained examiners, possesses a high degree of accuracy." James K. Murphy, *The Polygraph Technique: Past and Present*, FBI LAW ENFORCEMENT BULLETIN, June 1980, at 5.

The government's brief improperly relies on the 1983 OTA Report as supporting its reliability attack. (Br. of U.S. at 19-21). The areas of criticism in the report were focused on the problems with non-specific employment screening tests, methodologies of particular researchers, inadequately trained examiners and techniques other than the specific-issue control question test. All of the concerns were legitimate and none supports the exclusion of a numerically scored, standardized control question test administered, as in this case, by a well-qualified examiner. John C. Kircher & David C. Raskin, *Polygraph Techniques: History, Controversies, and Prospects, in* PSYCHOLOGY AND SOCIAL POLICY 295, 300 (Peter Suedfeld ed., 1992).

The employment screening test problem, which improperly uses polygraph to try to test general honesty rather than specific instances of conduct, was resolved by federal legislation, with the help of prominent polygraph researchers such as Professor Raskin. The Employee

Polygraph Protection Act of 1988, 29 U.S.C. § 2001, et seq., prohibits such screening tests by private employers, preserves the ability to conduct tests on specific financial misconduct issues, 29 U.S.C. § 2006(d), and grants the government a complete exemption from any of the prohibitions in the Act. 29 U.S.C. § 2006(a). *Stehney v. Perry*, 101 F.3d 295 (3d Cir. 1996).

With regard to untrained examiners or lack of procedures, the federal government has been particularly active in training and standardization, consistently with the standards of most reputable examiners and numerous state regulatory agencies. DOD Report, *supra*, at 14. The test results can therefore be independently analyzed, scored and critiqued. *United States v. Galbreth*, 908 F. Supp. 877 (D.N.M. 1995).

Scientific research on the control question technique has continued since the OTA Report, with the accuracy rates centering around the 90-95% level. *United States v. Crumby*, 895 F. Supp. 1354, 1360; David C. Raskin, *Polygraph Techniques for the Detection of Deception, in* PSYCHOLOGICAL METHODS IN CRIMINAL INVESTIGATION AND EVIDENCE 247, 268 (David C. Raskin ed., 1988). Even at the time of the 1983 OTA Report, "[t]he control question test was found to detect guilty subjects with a relatively high degree of accuracy,"[5] OTA Report, *supra*, at 70.

Government officials who vigorously oppose the use of polygraph evidence by the accused find it reliable enough

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[5] The report went on to express a concern about the rate of false positive errors in some of the studies it surveyed. A false positive error is one which improperly concludes an honest subject is being deceptive, and it occurs in about 5% to 10% of the tests. It is not relevant to the *Scheffer* test. *See United States v. Galbreth, supra*, at 891 and *United States v. Crumby, supra*, at 1360.

to use in their decision-making, despite their concern that it is too unreliable for ordinary jurors to deal with. The government routinely uses the polygraph against the accused in such decision-making contexts as determinations of probable cause for arrest, *Bennett v. City of Grand Prairie*, 883 F.2d 400 (5th Cir. 1989), *Johnson v. Schneiderheinz*, 102 F.3d 340 (8th Cir. 1996); decisions to prosecute, *Brodnicki v. City of Omaha*, 75 F.3d 1261 (8th Cir. 1996); forfeiture of a defendant's property, *United States v. Haselden*, No. 95-5610, 1996 U.S. App LEXIS 32989 (4th Cir. Dec. 17, 1996)[6]; prison disciplinary proceedings, *Stone-Bey v. Debruyn*, No. 95-3214, 1996 U.S. App. LEXIS 30012 (7th Cir. Nov. 14, 1996); parole revocation proceedings, *Martin v. Parker*, No. 90-3746, 1991 U.S. App. LEXIS 2526 (6th Cir. Feb. 13, 1991); conditions of plea agreements, *United States v. Lewis*, 110 F.3d 417 (7th Cir. 1997); to vouch for the credibility of government witnesses, *United States v. Winkelman*, No. 96-5365, 1996 U.S. App. LEXIS 30169 (6th Cir. Nov. 15, 1996), *United States v. Fern*, Nos. 95-4099, 95-4596, 1997 U.S. App. LEXIS 18942 (11th Cir. July 24, 1997); in determining whether to agree to a downward departure in sentencing, *United States v. Morrison*, No. 95-8562, 1996 U.S. App. LEXIS 27409 (4th Cir. Oct. 22, 1996); and numerous other uses. *See generally* James R. McCall, *Misconceptions and Reevaluation - Polygraph Admissibility After Rock and Daubert*, 1996 U. ILL. L. REV. 363, 379.

Although a review of the scientific literature and of the *Daubert* findings in litigated cases ought to support the

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[6] A computer search for federal polygraph cases discloses a large number of decisions that are designated as not to be reported. To the extent those decisions are referenced in this section, they are not cited for their precedential value in any way, but simply for the factual data revealed in them.

conclusion that the polygraph is scientifically reliable, that issue is really not one that need be addressed at this time. By its ruling below, the court relied on a *per se* exclusionary rule that prevented a litigant from making the *Daubert* showing that this Court has determined should be made at the trial court level in determining the admissibility of scientific evidence. The trial court instead upheld the blanket exclusionary rule without any evidentiary justification submitted in its support by the government. The extant evidence available to this Court, however, should show that a blanket exclusionary rule barring polygraph from *Daubert* consideration now and in the future cannot be justified on even a judicial notice or "executive notice" theory.

2. Polygraph Evidence Is Not Unduly Time-Consuming.

There is no empirical study that supports any conclusion that polygraph evidence is generally more time-consuming than the diverse variety of scientific evidence that the courts deal with in the course of litigation on a regular basis.[7] There is absolutely no reason why potential disputes over qualifications, foundations, cross-examination and disagreements among experts need take any more time for polygraph than it does for DNA, psychiatric disputes, legal economics or the issues about hypnotized witnesses that this Court faced in *Rock v. Arkansas*, 483 U.S. 44 (1987). The problem of the battle of the experts "is present in every area of expert testimony and the best solution is the discerning judgment of the jury," subject to the trial court's gatekeeping discretion. *State v. Mendoza*, 80 Wis. 2d 122, 163, 258

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[7] In fact, the evidence is to the contrary. *See* Robert B. Peters, *A Survey of Polygraph Evidence in Criminal Trials*, 68 ABA JOURNAL 162 (1982), discussed more fully in Point IB3, *infra*.

N.W.2d 260, 278 (1977).

The only reported case where any dispute about polygraph evidence has consumed more than a day or two, at the most, has been the inexplicable consumption of four days in *Commonwealth v. Mendes*, 406 Mass. 201, 547 N.E.2d 35 (1989), cited in the government's brief. Whatever the reasons that caused a hearing of that length in that particular case on polygraph-related issues, there is certainly no showing that such an experience is the rule, rather than the exception. In any event, no other body of scientific evidence has ever been categorically excluded because of time consumption considerations.

Rule 403 of the Federal Rules of Evidence certainly provides a trial judge with the appropriate tools to balance all appropriate considerations and determine in a particular case when relevant evidence will simply take too much court time to justify its admission. Even in the exercise of that exclusionary discretion, "Rule 403 does not mean that a court may exclude evidence that will cause delay regardless of its probative value." *Johnson v. United States*, 780 F.2d 902 (11th Cir. 1986), *quoting* Weinstein's Evidence, ¶ 403[06] at 403, 59-60 (1982); *Ballou v. Henri Studies, Inc.*, 656 F.2d 1147 (5th Cir. 1981); *Bower v. O'Hara*, 759 F.2d 1117 (3d Cir. 1985).

3. Polygraph Evidence Does Not Intrude on the Function of the Jury.

The government articulates to this Court the apprehension that polygraph evidence will wreak some fundamental change in our system of trial by jury, by supplanting the jury with a decision-making box, by overwhelming the jury into unthinking agreement with the polygraph expert or by sending them into a state of confusion. Those fears are demonstrably unfounded.

The polygraph does not function as the ultimate decision-maker of guilt or innocence, and the polygraph expert cannot possibly replace the ultimate function of the jury in that regard, any more than can the DNA expert, the drug-screen expert in the court below, or any other expert witness that juries hear day in and day out in courts of law throughout the nation.

The specific issue control question polygraph test focuses on particular fact issues rather than the ultimate trial decision. It provides circumstantial evidence of consciousness of deception or truthfulness by a particular witness on a particular fact question at the time of the administration of a polygraph exam. By comparing the subject's involuntary autonomic nervous system's reactions to the relevant questions in the case with the subject's reactions to known lies, the test provides objective and scientific evidence of the likelihood of the test subject's own consciousness of truth or deception on discrete factual questions. It does not determine ultimate issues of guilt or innocence, but simply provides additional circumstantial evidence for the factfinder to consider, along with all other evidence.

Juries have traditionally been encouraged to consider observations of external demeanor as guides to determining consciousness of truthfulness or deception by a witness, despite the known difficulties in making accurate judgments in that manner. Paul Ekmon & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AMERICAN PSYCHOLOGIST 913 (1991). Flight, evidence tampering, obstruction of justice and numerous other physical activities reflecting consciousness of guilt have routinely been admissible in all courts. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT § 3:04 (1996). Similarly, circumstantial evidence of subjective consciousness of innocence "may be admitted as relevant to show defendant's lack of guilty

knowledge." JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 401.08[4] at 401-59 (Joseph M. McLaughlin ed., 2d ed. 1997).

Even on the focused questions of relevant fact which are the subject of the polygraph examination, the jury will be advised that the polygraph is neither magic nor foolproof, any more than the urine analysis[8] in this case. The accused in this case may or may not have been guilty, but that is for the factfinder to decide after consideration of all the evidence bearing on the issue. There is simply no credible evidence that the polygraph will replace our time-honored tradition of evaluation of all the evidence by a jury of peers with a polygrapher or any other expert witness.

The fear that scientific evidence will overwhelm or confuse the jury is not unique to polygraph evidence. This Court recently addressed and rejected it in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595-96 (1993):

> Respondent expresses apprehension that abandonment of "general acceptance" as the exclusive requirement for admission will result in a "free-for-all" in which befuddled juries are confounded by absurd and irrational pseudo-scientific assertions. In this regard Respondent seems to us to be overly pessimistic about the capabilities of the jury, and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but

[8] One might reasonably expect that the urinalysis expert is more likely to be treated as the "Delphi oracle" than the polygrapher, despite comparable error rates for the evidence.

> admissible evidence. *See Rock v. Arkansas*, 483 U.S. 44, 61 (1987).

This Court noted that these conventional devices, rather than wholesale exclusion, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

Not only is the fear of the jury's vulnerability inconsistent with our adversarial system of justice, it is an apprehension that has been proven in scientific studies and practical experience to be absolutely unfounded. Charles R. Honts & Mary V. Perry, *Polygraph Admissibility: Changes and Challenges*, 16 LAW AND HUMAN BEHAVIOR 357, 366 (1992); David C. Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Acceptance of Polygraph Evidence*, 1986 UTAH L. REV. 29, 64-66. Cases which have reviewed the literature[9] have concluded that there is no evidence to support the fear that the polygraph evidence will confuse or mislead the jury. *See, e.g., United States v. Piccinonna*, 885 F.2d 1529, 1533 (11th Cir. 1989) (the "studies refute the proposition that jurors are likely to give disproportionate weight to polygraph evidence."); *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1048-49 (S.D.N.Y. 1995); *United States v. Galbreth*, 908 F. Supp. 877, 895 (D.N.M. 1995).

The *Galbreth* opinion applied a *Daubert* analysis to polygraph evidence and rejected the kinds of unsubstantiated fears being relied on by the government before this Court. *Galbreth* was authored by a federal judge sitting in a state that has over two decades of practical experience with the use of polygraph evidence in the courts. In fact, New Mexico has the only sustained period of general admission of unstipulated polygraph results in any United States

[9] Some of the voluminous literature on the subject is collected in the brief for *Amicus Curiae* Committee of Concerned Social Scientists.

jurisdiction.

In 1973, New Mexico adopted the federal rules of evidence from this Court's proposed draft, before Congress formally amended and adopted the rules for the federal court. *See* Leo M. Romero, *The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence,* 6 N.M. L. REV. 187 n.1 (1976). The first case in the New Mexico Supreme Court addressing new Rule 702 reached the same result as did *Daubert* in this Court almost two decades later in determining that the outdated *Frye* test had been replaced by a standard of more open admissibility. *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975). The court concluded that a blanket exclusion of unstipulated polygraph evidence was mechanistic in nature and inconsistent with the thrust of the modern rules of evidence.

In 1983, the court followed up on its *Dorsey* opinion by promulgating New Mexico rule of evidence 11-707, which has remained in effect since that date to provide procedures for pretrial notice, discovery and admissibility of polygraph evidence. N.M. R. EVID. 11-707 (Michie 1997). *See generally* James R. McCall, *Misconceptions and Reevaluation - Polygraph Admissibility After Rock and Daubert*, 1996 U. ILL. L. REV. 363, 385-88.

While apprehensions were being expressed in courts which had no opportunity to observe what happens when unstipulated polygraph evidence is admitted before real juries, for the last two decades New Mexico quietly administered justice in its own courts with no reported adverse effects resulting from its lack of a *per se* exclusionary rule against polygraph evidence. The few litigated cases reported during that time have dealt with clarifying admissibility, discovery and other procedural requirements. *See, e.g., State v. Baca*, 120 N.M. 383, 902 P.2d 65 (1995); *Baum v. Orosco,* 106 N.M. 265, 742 P.2d

1 (Ct. App. 1987).

After 22 years of the doors of the New Mexico courts being open to the consideration of expert polygraph testimony, the results have been described within the state as follows:

> Twenty years of wide open admissibility and mock jury experiments elsewhere have shown that jurors quite capably deal with the evidence just as they deal with other expert evidence, with a healthy degree of skepticism. It is no more confusing to the average jury than a great deal of psychiatric, medical and other expert evidence routinely admitted in trials every day.

Charles W. Daniels, *New Frontiers in Polygraph Evidence*, 25 THE NEW MEXICO TRIAL LAWYER 97, 107 (1997). The evidence has not dominated trials in New Mexico in any regard. In fact, it has been used only occasionally in either criminal or civil cases, although admissible in both. *Id.* at 105.

The long New Mexico experience with admissibility of unstipulated polygraph evidence, ignored by those who have relied on the theory of jury confusion, has been noted with approval by several national commentators who have studied the subject. "Ten years of experience there has failed to reveal any inherent problems with that type of evidence. In addition, there is no indication that polygraph testimony exerts excessive influence on triers of fact." David C. Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Acceptance of Polygraph Evidence*, 1986 UTAH L. REV. 29, 66. The "experience in the State of New Mexico is especially valuable," but it "has not been given the attention it merits in current reconsideration opinions." James R. McCall, *Misconceptions and Reevaluation - Polygraph Admissibility*

After Rock and Daubert, 1996 U. ILL. L. REV. 363, 422, 417.

The *amicus* brief of the attorneys general refers to purported experiments with polygraph admissibility in four states which are said to have concluded that consideration of the evidence adversely affected the judicial system. There are several observations that should be made about the reality of what happened in those states.

First, all four of the states established a cumbersome procedure of admitting the evidence only upon stipulation, which assigned to the trial judge an additional role as factfinder to ensure protection of the defendant's constitutional rights and to make "a close and searching inquiry into the qualifications of the examiner, the fitness of the defendants for such examination, and the methods utilized in conducting the tests." *Commonwealth v. Mendes*, 406 Mass. 201, 206, 547 N.E.2d 35, 38 (1989). The courts found that the "stipulation simply cannot adequately deal with all situations which might arise affecting the accuracy of any particular test." *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983). The stipulation approach is not only jurisprudentially unsound, it creates the very problems those courts faced.

Second, those pre-*Daubert* exclusion decisions relied on the old *Frye* test to base their central holdings primarily on the proposition that polygraph did not meet the reliability and acceptability standards of *Frye*.

Third, none of the cases cited any particular data or experience, other than the fact that there was a four-day hearing on one occasion in Massachusetts, to support the proposition that the polygraph consumed too much time or adversely effected juries. The cases simply cannot be relied upon to support the proposition that there is any real adverse effect on the fact-finder or the trial process. In fact, the Wisconsin court frankly acknowledged that it had "no

empirical data as to the effect of the [limiting] instruction or the influence of polygraph evidence on the conduct of trial or on the jury verdict." *State v. Dean*, 103 Wis. 2d 228, 276, 307 N.W.2d 628, 652 (1981).

The data easily could have been obtained, however. The attorney generals' brief failed to mention that the Wisconsin Crime Laboratory Bureau conducted a study of "the effect admission of polygraph evidence has had on the trial process" in Wisconsin during that time. Robert B. Peters, *A Survey of Polygraph Evidence in Criminal Trials*, 68 ABA JOURNAL 162 (1982). The findings of this government agency are significant: (1) polygraph evidence was used on an "infrequent" basis; (2) the polygraph evidence generally took less than two hours of trial time and never more than five hours; (3) the jurors proved to be "capable of weighing and evaluating all evidence and rendering verdicts that may be inconsistent with the polygraph evidence"; (4) "[p]olygraph examinations favor neither defense nor prosecution"; (5) "polygraph evidence is not disruptive of court proceedings" and (6) "polygraph does not assume undue influence in the evidentiary scheme." *Id.* at 164-65.

Not only is there no empirical or experimental evidence to support the apprehensions of adverse effect on individual juries or the jury trial process in general, both the experimental studies and the actual in-court experience with polygraphs point without contradiction to the contrary result. This potentially relevant and scientifically reliable evidence should not be excluded from the judicial fact-finding process by fear itself.

4. The Blanket Evidentiary Exclusion of an Entire Field of Science is Jurisprudentially Unsound.

This case squarely presents this Court with a blanket ban on potentially relevant and exculpatory evidence. It cannot be construed as a redefinition of the mental-state element of a particular offense, as could be done with the rule construed in *Montana v. Egelhoff*, 116 S.Ct. 2013 (1996), but instead applies across the board to all prosecutions for alleged violation of all substantive offenses. The rule essentially precludes a litigant from making a *Daubert* showing of relevance and reliability in the context of a particular case. It results not only in the negation of *Daubert*, it is also worse than the discredited *Frye* test, which at least kept the doors of the courthouse open to developments in scientific knowledge.

An affirmance of the court below does not require that the polygraph be admitted in any particular case, but simply would hold that the door cannot be closed to a court's consideration of this field of scientific learning in all cases. There are certainly occasional overriding policy interests, such as the protection of constitutional rights or the preservation of privileged relationships or Rule 403's recognition of the necessity for individual decisions in individual cases, that justify the exclusion of otherwise relevant and admissible evidence, but this blanket exclusion cannot be justified on any such principled grounds.

Rule 707 operates to impede the discovery of truth, based on unfounded and speculative apprehensions. As Justice Potter Stewart so ably observed many years ago, "[A]ny rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (concurring). The mechanistic exclusionary rule at issue here impedes the doing of justice and the Court of Appeals was correct in so holding.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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